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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91212653
Party	Plaintiff Nautica Apparel, Inc.
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Attachments	Response to motion to dismiss 91212653.pdf(594124 bytes )

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

-----X		
NAUTICA APPAREL, INC.,	:	Opposition No.: 91212653
	:	
Opposer,	:	
	:	
v.	:	
	:	
MAJESTIQUE CORPORATION,	:	
	:	
Applicant.	:	Mark: 
	:	
	:	Ser. No. 85883577
-----X		

**RESPONSE TO APPLICANT’S MOTION FOR INVOLUNTARY DISMISSAL**

**I. BACKGROUND**

On April 22, 2016, Opposer filed a motion for extension of trial dates (to extend Opposer’s trial period through May 16<sup>th</sup>). Applicant did not file a response. On June 10, 2016, the Board ruled that “Opposer’s April 22, 2016 motion for extension of trial dates is granted as conceded.”

On May 20, 2016, Opposer filed a motion to reopen and reset trial dates (to extend Opposer’s trial period through June 10<sup>th</sup>). Applicant had until June 9, 2016 to respond/object to the motion (i.e., 15 plus 5 days from 5/20/16 = 6/9/16, *see* 37 CFR §2.127(a) and TMBP § 502.02(b)). Applicant did not file a response on or before June 9<sup>th</sup>. Accordingly, the Board in its discretion may treat the motion as conceded. *See* 37 CFR §2.127(a).

On June 10, 2016, Applicant filed a “Motion for Involuntary Dismissal of Opposition for Failure to Comply with USPTO Schedule Order”. On the same date, the TTAB issued an order suspending the proceedings “pending disposition of Opposer’s May 20, 2016 motion, and Applicant’s June 10, 2016 motion.”

Accordingly there remains pending, (1) Opposer's motion to reopen and reset trial dates, and (2) Applicant's motion for Involuntary Dismissal. As background to both, Opposer since before making its motion to extend on April 22<sup>nd</sup> through the present, has attempted to communicate with Applicant's attorney on numerous occasions, regarding testimony, scheduling/availability, and/or consent or other response to Opposer's requests. Applicant's attorney has never once responded.

A summary of those attempts include:

- 3/15/16 Email advising Mr. Negretti of Opposer's witness' general dates of availability and requesting Mr. Negretti's availability to enable scheduling of testimony deposition.

No response

- 4/19/16 Email advising Mr. Negretti of Opposer's witness' availability; asking for Mr. Negretti's availability; requesting consent to an extension of trial dates to accommodate scheduling of deposition.

No response

- 4/21/16 Call to Mr. Negretti – left message with his office.

No response

4/22/16 Opposer filed a Motion to Extend until May 16, 2016.

No response.

- 4/22/16 Email advising Mr. Negretti that have sent emails and called and never heard from him; attached courtesy copy of motion to extend trial dates and courtesy copy of Notice of Taking Testimony set for May 10<sup>th</sup>.

No response

- 5/5/16 Call to Mr. Negretti to discuss scheduling/availability – left message with his office

No response

- 5/9/16 Call to Mr. Negretti to discuss scheduling/availability – left message with his office

No response

5/9/16 Email advising Mr. Negretti that deposition adjourned and that I would be filing a motion to extend trial dates.

No response

5/16/16 Opposer's trial period ended, having inadvertently been allowed to expire.

- 5/18/16 Call to Mr. Negretti seeking consent to reopen and reset trial dates and to inquire as to Mr. Negretti's availability on June 9, 2016 for Opposer's testimony deposition. Left message with his office.

No response

- 5/18/16 Email explaining to Mr. Negretti that the undersigned has been and was in the midst of an acute family crisis and out of the office for some time; advising Mr. Negretti of Opposer's witness' availability on June 9, 2016 with request to see if fits with Mr. Negretti's schedule; request consent to reopen and extend to accommodate the deposition.

No response

5/20/16 Opposer filed Motion to Reopen and Reset Trial Dates (with Opposer's period to close 6/10/16).

- 5/20/16 Email to Mr. Negretti with attached motion to reopen and extend and with copy of Notice of Taking Testimony of Opposer's witness; and requesting Mr. Negretti's availability.

No response

- 6/8/16 Call to Mr. Negretti to arrange conference call with Interlocutory Attorney regarding outstanding motions to extend/reopen; was told that Mr. Negretti would call me back.

No response

- 6/8/16 Email to Mr. Negretti advising of call to Interlocutory Attorney; advising that the deposition was being adjourned; advising that I would be filing a new motion to suspend pending resolution of pending motions.

No response

6/9/16            Applicant's due date to respond/object to Opposer's Motion to Reopen.

No response filed by Applicant.

6/10/16           Applicant filed a Motion for Involuntary Dismissal

6/10/16           TTAB Order suspending proceeding pending decision on (1) Opposer's Motion to Reopen and (2) Applicant's Motion for Involuntary Dismissal

## **II. APPLICANT'S MOTION FOR INVOLUNTARY DISMISSAL SHOULD BE DENIED**

On April 22, 2016, Opposer filed a motion for extension of trial dates. Prior thereto, Opposer attempted to engage Applicant's attorney by phone and email to advise Mr. Negretti of Opposer's witness' availability; asking for Mr. Negretti's availability; and requesting consent to an extension of trial dates to accommodate scheduling of deposition. Opposer received no response, filed its motion to extend, and also served Applicant with a Notice of Taking Testimony to take place on May 10, 2016. The motion was granted by the Board on June 10, 2016.

Since April, Opposer has made continued attempts to communicate with Applicant's attorney, to no avail. On May 9, 2016 Opposer's attorney was in the midst of an acute and ongoing crisis concerning a family member. Applicant's attorney was advised on May 9<sup>th</sup> that the deposition set for the 10<sup>th</sup> was being adjourned and that Opposer would be filing a new motion to extend.

On May 16<sup>th</sup>, the date Opposer's trial period was extended to, Opposer was in the midst of an acute family crisis, was away and had been away from the office for a number of days dealing with the crisis, and inadvertently allowed the period to close without timely making the motion to extend that Applicant was advised of.

On May 18<sup>th</sup>, the undersigned emailed Applicant's attorney requesting consent to reopen and reset trial dates and requesting said attorney's dates of availability for deposition. Again, no response. Accordingly, on May 20<sup>th</sup> the undersigned filed the subject motion to reopen with request to reset Opposer's trial period to June 10, 2016. On June 10<sup>th</sup>, the Board suspended proceedings pending resolution of Opposer's motion to reopen and Applicant's motion to dismiss.

Applicant's motion to dismiss for Opposer's alleged failure to comply with the Board's scheduling order of March 10, 2016 is set forth in two paragraphs of Applicant's motion, namely:

Applicant's one sentence assertion that Opposer failed to comply with the Board's scheduling order of March 10, 2016 (see ¶ 5 of Applicant's motion) and Applicant's one sentence request for dismissal for "failure of Opposer to comply with the schedule order without just cause" (see ¶ 7 of Applicant's Motion).

As addressed above, Opposer timely filed a motion to extend the March 10<sup>th</sup> Board scheduling order, which motion has been granted by the Board. Accordingly, Opposer did not fail to "comply" with the Board's scheduling order of March 10, 2016.

After adjourning the testimony deposition and advising that a motion to extend would be filed, the undersigned inadvertently and as a result of an acute family crisis, failed to timely file the additional motion to extend. The undersigned immediately attempted to communicate with Applicant's attorney concerning the matter, to explain the matter and to request consent to reopen. Applicant's attorney did not respond. Accordingly, the motion to reopen was filed. Applicant's time to respond to the motion (30 plus 5 days) ended on June 9, 2016, with no response from Applicant. Accordingly, the Board may, in its discretion, treat the motion to

reopen as conceded. Or, as stated at TBMP §509.02: “if the nonmoving party fails to file a brief in opposition thereto, the Board will normally grant the motion as conceded.”

It is respectfully argued that if the Board treats Opposer’s motion to reopen as conceded, Applicant’s motion to dismiss will be moot.

Applicant’s motion to dismiss claims that Opposer’s failure to comply with the Board’s scheduling order was without “just cause.”

Opposer is unsure what Applicant means by “just cause.” The term is defined in Black’s Law Dictionary as “[a] cause outside legal cause, which must be based on reasonable grounds, and there must be a fair and honest cause or reason, regulated by good faith.” In that regard, the undersigned, who is responsible for the instant case, was fully engaged and overwhelmed by an acute family crisis at the time a motion to extend should have been filed. The crisis is quite personal in nature. The undersigned is amenable to explaining the same to the Board / Interlocutory Attorney, *in camera*. To the extent necessary, the undersigned declares under penalty of perjury, that the cause is based on reasonable ground and is a fair and honest cause or reason regulated by good faith.

To the extent that Applicant’s reference to “just cause” is intended to refer to the excusable neglect standard of *Pioneer Investment Services Co. v. Brunswick Associates L.P.*, 507 U.S. 380 (1993), adopted by the Board in *Pumpkin Ltd. v. The Seed Corps*, 43 USPQ2d 1582 (TTAB 1997), it is respectfully submitted that the circumstances are sufficient to show excusable neglect.

The excusable neglect factors (i.e., the “Pioneer factors”) are (1) the danger of prejudice to the nonmovant, (2) the length of the delay and its potential impact on judicial proceedings, (3)

the reason for the delay, including whether it was within the reasonable control of the movant, and (4) whether the movant acted in good faith.

Prejudice to Applicant. There is no danger of prejudice to Applicant and, indeed, the Applicant does not raise a *bona fide* claim of prejudice. Further in that regard, and as stated in TBMP § 509.01(b)(1):

The "prejudice to the nonmovant" contemplated under the first *Pioneer* factor must be more than the mere inconvenience and delay caused by the movant's previous failure to take timely action, and more than the nonmovant's loss of any tactical advantage which it otherwise would enjoy as a result of the movant's delay or omission. Rather, "prejudice to the nonmovant" is prejudice to the nonmovant's ability to litigate the case, e.g., where the movant's delay has resulted in a loss or unavailability of evidence or witnesses which otherwise would have been available to the nonmovant.

*See, Pumpkin Ltd. v. The Seed Corps*, 43 USPQ2d 1582, 1587 (TTAB 1997) (citing *Pratt v. Philbrook*, 109 F.3d 18 (1st Cir. 1997)); *Paolo's Associates L.P. v. Bodo*, 21 USPQ2d 1899, 1904 (Comm'r 1990). Applicant does not and cannot show prejudice.

Length of Delay and Potential Impact on Proceeding. Within two days of the missed date Opposer called and emailed Applicant's attorney. As has been the case since March of this year, Applicant's attorney did not respond. Within four days of the missed date, Opposer filed its motion to reopen. The delay was negligible. Discovery is closed, and Opposer seeks only to take the testimony deposition of its witness.

Reason for the Delay. The reason for the delay is discussed above. Again, the undersigned will, at the request of the Interlocutory Attorney, provide an *in camera* explanation of a very personal matter.

Whether Movant Acted in Good Faith. There is no bad faith purpose behind Opposer's motion to reopen and/or its response to motion to dismiss. Further, movant has acted in good faith to resolve the matter with Applicant, including attempting to set up a telephone conference with the Interlocutory Attorney. Applicant is non-responsive.

**APPLICANT'S ADDITIONAL CLAIMS IN ITS MOTION TO DISMISS  
ARE INACCURATE AND UNSUPPORTABLE**

As either intended support for Applicant's motion for Involuntary Dismissal or as an adjunct thereto, Applicant's motion adds the following inaccurate and unsupportable assertions:

1<sup>st</sup> Unsupportable Assertion – "Opposer has failed . . . to provide discovery" (see ¶¶3 and 4 of Applicant's motion to dismiss). In the second sentence of the paragraph, Applicant confuses itself with Opposer, stating that "Opposer was forced to file Motion to Compel on 2/19/2014 and on 10/31/2014." In that regard, Applicant did file a motion to compel on 2/19/2014, but that motion was denied by the Board. However, it was Opposer who filed a motion to compel on 10/31/2014. And, as previously briefed, the Board ruled on Opposer's said motion to compel by ordering Applicant to serve sworn responses to interrogatories and to serve supplemental responses to interrogatory nos. 7-9, 15-16, 19-22 and 28 and to document requests 4-5, 14, 16, 20-22, 24.

Additionally, Opposer notes that Opposer responded to Applicant's Request for Admissions on 10/16/2015. Applicant never raised with Opposer any objection or claimed that any of the responses are deficient.

Opposer also responded to Applicant's interrogatories on 10/16/2015, by objecting to the same pursuant to 37 CFR §2.120(d) (75 limit rule). Applicant never raised with Opposer any

objection or claimed that the response/objection is deficient. Applicant never made any effort to revise its interrogatories to be in conformance with the rule.

Opposer also responded to Applicant's document requests on 10/16/2015. Applicant never raised with Opposer any objection or claimed that the responses are deficient.

Applicant's statement is without basis of any kind.

2<sup>nd</sup> Unsupportable Assertion – Applicant's assertion that "the procedure history of the [case] shows consistent requests by Opposer to delay and extend the trial schedule." See ¶4 of Applicant's motion to dismiss. As previously pointed out, Applicant's statement is without basis. The actual facts are as follows.

Regarding motions to extend: Until Opposer's April 22<sup>nd</sup> motion to extend, the case history is:

- 7/17/2015 Applicant filed a motion, on consent of Opposer, to extend its time to comply with the Board's Order dated 6/17/15.
- 8/18/2015 Opposer filed a motion, on consent of Applicant, to extend trial dates for purposes of (discovery)

There were no other requests to extend time/obtain continuance filed in this proceeding.

Hence, one motion on consent to extend made by Applicant and one motion on consent to extend made by Opposer.

Regarding any other delays, the facts are as follows:

Motion to Strike

- 11/8/2013 Nautica filed a motion to strike six of Applicant's Affirmative Defenses.
- 1/22/2014 The Board ordered three of Applicant's Affirmative Defenses stricken, thus helping to narrow and limit issues in this proceeding, thereby also serving as a guide in conducting discovery – which was Nautica's intent. It was not frivolous.

Motions to Compel

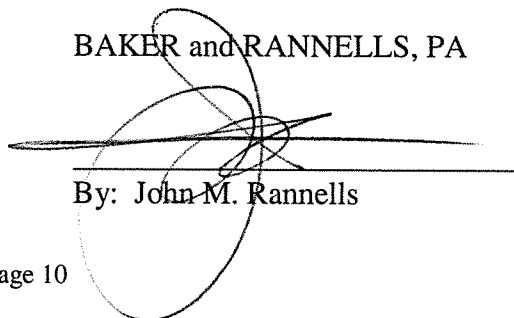
- 2/17/2015 Nautica filed a motion to compel as regards Applicant's discovery responses.
- 2/19/2015 Applicant filed a motion to compel as regards Nautica's discovery responses.
- 4/16/2014 The Board denied both parties' motions as being promulgated while the case was suspended during the above motion to strike. The parties were instructed by the Board to re-serve their discovery requests, including initial disclosures. All discovery requests served prior thereto were considered a nullity. Opposer promptly re-served its discovery requests.
- 10/3/2014 Applicant's responses were deficient. Accordingly, Nautica filed a motion to compel full responses to interrogatories 3, 5-9, 15-16, 19-22 and 28 and to document requests 4-5, 14-22 and 24, and to provide sworn response to interrogatories.
- 11/13/14 [Docket #16] Applicant filed a motion to compel discovery of Nautica and to dismiss the opposition.
- 2/13/15 [Docket #18] The Board denied Applicant's motion to compel in its entirety, and denied Applicant's motion to dismiss in its entirety.
- 6/17/2015 (Docket #20] The Board ruled on Nautica's motion to compel by ordering Applicant to serve sworn responses to interrogatories and to serve supplemental responses to interrogatory nos. 7-9, 15-16, 19-22 and 28 and to document requests 4-5, 14, 16, 20-22, 24.

There was nothing frivolous about Nautica seeking to obtain and obtaining full responses to its discovery requests. On the other hand, Applicant's motions were baseless and they were denied.

For the foregoing reasons, Opposer's motion to reopen should be granted with new trial dates set by the Board, and Applicant's motion to dismiss should be denied.

Respectfully submitted,

BAKER and RANNELLS, PA

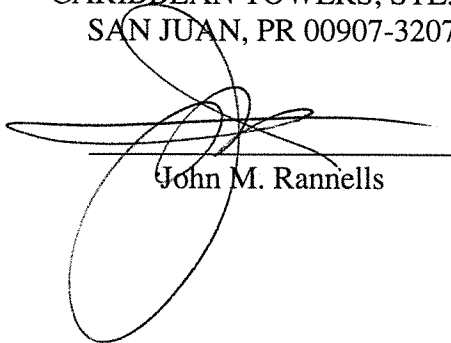


By: John M. Rannells

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the above Response to Applicant's Motion for Involuntary Dismissal was sent to attorneys for Applicant this 17<sup>th</sup> day of June, 2016 via first class mail, postage prepaid, to the following:

GINO NEGRETTI LAW OFFICES  
670 PONCE DE LEON AVE.  
CARIBBEAN TOWERS, STE. 17  
SAN JUAN, PR 00907-3207

  
John M. Rannells